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Dan Fenno Henderson
University of Washington School of Law

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II. THE SCOPE OF JUSTICIABILITY IN CONSTITUTIONAL LAW

JAPANESE JUDICIAL REVIEW OF LEGISLATION: THE FIRST TWENTY YEARS

DAN FENNO HENDERSON

The Constitution of 1947 for the first time opened to the Japanese courts the possibilities of judicial review of legislation. Since then the courts have moved to develop this new power by case decisions. The new role for the judiciary in refining Japanese constitutionalism flows from two premises which were drafted into the Constitution: (1) that popular government necessarily means government limited by law; and (2) that any law, constitutional or otherwise worthy of the name, confers rights justiciable in the ordinary courts of law.

Prior to 1947, the prerogative of determining the constitutionality of statutes and official acts did not rest with the judiciary. The Meiji Constitution (1889) was largely a formalization of the power structure built by the oligarchy which led the Meiji restoration (1868). Under it, the ruling elite interpreted the constitution in fact, and the scholars developed its theory in textbooks and scholarly disquisitions; differences of opinion on constitutional issues were determined by *political* preferences; they were not justiciable issues *legally* determinable.¹

The shift in 1947 from a political to a legal (or justiciable) constitution of Anglo-American design meant also a shift from professors to the courts as the authoritative expounders of the Constitution, though of course the leading critics and synthesizers are still the scholars. Soon followed, for the first time, a body of Supreme Court decisions which became the detailed sources of constitutional law, presaging adoption throughout the legal profession of a new juristic method in the public law field using scholarly theories where appropriate but rooted in case analysis. These changes in professional roles, sources and methods have caused a new emphasis on American constitutional studies and perhaps some dilution of the prior preferences for continental European theories. But these transitions have not

¹Takayanagi, *The Conceptual Background of the Constitutional Revision Debate in the Constitution Investigation Commission*, 1 LAW IN JAPAN 15 (1967).

taken place without some groping for direction, and it is the purpose of this introduction to outline briefly some of the postwar developments. Emphasis is placed on the functioning of Japanese judicial review,² not its substantive results.³

I. THE PRE-1945 ANTECEDENTS OF JUDICIAL REVIEW

Much of the interest to American comparative lawyers in recent Japanese judicial decisions defining the new judicial power comes not only from the achievements of the past twenty years, but also from the analytical paths traversed en route. This is because, to an American lawyer, the results might seem obvious from a reading of the constitutional provision for judicial review,⁴ which seems like a simple codification of *Marbury v. Madison*.⁵ Yet to the Japanese jurist of 1952, faced with a confluence of traditional and continental constitutional theory from his immediate past with American constitutional law from the allied occupation, the meaning and implementation of Article 81 were far from obvious.⁶

Though the judicial theories underlying the Meiji Constitution have been more fully set forth elsewhere in English,⁷ it is useful here to note this legacy of the Japanese jurist. Of the general position of the Constitution in the Imperial government, a leading architect of the

² D. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN*, 405, 423, 445 (R. Ward ed. 1968). See Kakudo, *The Doctrine of Judicial Review in Japan*, 2 *OSAKA L. REV.* 59 (1953) for a discussion of scholarly theories.

³ For studies in English of the doctrinal results of judicial review in Japan, see the articles by Beer, Ukai and Nathanson, and George *infra* this symposium. Also some twenty-six decisions are translated in J. MAKI, *COURT AND CONSTITUTION IN JAPAN* (1964) [hereinafter cited as MAKI]. Other studies: M. Ito, *The Rule of Law: Constitutional Development*, in *LAW OF JAPAN* 205 (A. von Mehren ed., 1963); K. Hashimoto, *The Rule of Law: Some Aspects of Judicial Review of Administrative Action*, in *LAW OF JAPAN* 239 (A. von Mehren ed., 1963); Nathanson, *Constitutional Adjudication in Japan*, 7 *AM. J. COMP. L.* 195 (1958); Nathanson, *Constitutional Protection of Freedom of Assembly in Japan and the United States*, 12 *INT'L COMP. L. Q.* 1032 (1963); Nathanson, *Human Rights in Japan through the Looking Glass of the Supreme Court Opinions*, 11 *HOWARD L.J.* 318 (1965); Ouchi, *Defamation and Constitutional Freedom in Japan*, 11 *AM. J. COMP. L.* 73 (1962); Tokikuni, *Obscenity and the Japanese Constitution*, 51 *KY. L.J.* 703 (1963). George, *Impact of the Past on the Right of the Accused in Japan*, 14 *AM. J. COMP. L.* 672 (1965-66).

⁴ JAPANESE CONST. art. 81: The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

⁵ 5 U.S. (1 Cranch) 137 (1803).

⁶ Kakudo, *The Doctrine of Judicial Review in Japan*, 2 *OSAKA L. REV.* 59 (1953).

⁷ E.g., H. QUIGLEY, *JAPANESE GOVERNMENT AND POLITICS* 273-90 (1932); T. Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in *LAW IN JAPAN* 111, 119 (A. von Mehren ed., 1963). See in Japanese, S. UESUGI, *KEMPŌ JUTSUGI* 594 (rev. ed. 1940).

Meiji Constitution, Hirobumi Itō, wrote in 1889 when the Constitution was promulgated:⁸

The doctrine of the independence of the three powers (the judicature, the executive and the legislature), which prevailed in Europe at the close of the last century, has already been condemned both by scientific principles and by practical experience. The judicature is combined in the sovereign power of the Emperor as part of His executive power. The word "executive," when used as opposed to the word "legislative," has a comprehensive signification: the judiciary is only a part of the executive, and the executive, strictly speaking, is made up of two parts, the judiciary and the administrative, each performing distinct services. This principle is at present generally acknowledged by writers on public law, and it is not necessary in this place to dwell upon the subject. Though it is in the power of the Sovereign to appoint judges, and though the courts of law have to pronounce judgment in the name of the Sovereign, yet the Sovereign does not take it upon Himself to conduct trials, but causes independent courts to do so, in accordance to law and regardless of the influence of the administrative. Such is what is meant by the independence of the judicature. This theory has no connection with the doctrine of the independence of the three powers, but it is still an immutable principle.

More concretely, prewar law courts were placed under the Ministry of Justice for administration of judicial appointments, promotions and the like, which was, no doubt, an inhibiting factor for the judges, though there is wide agreement that after unsuccessful attempts to pressure the judges in the famous test case⁹ of Wada Sanzō involving the stabbing of the Russian Crown Prince (later Nicholas II), the government did not try to influence judges in the decision of specific cases.

The Meiji judicial power was also divided into law courts and administrative courts¹⁰ so that the law courts only functioned in the private law area to resolve disputes between private individuals concerning contracts, torts, property and family matters, whereas the separate administrative court alone could handle claims against officials for exceeding their authority. Only one such administrative court existed, and its jurisdiction was quite limited. As noted elsewhere, "the legal limits on administrative power as practiced in prewar Japan were

⁸ H. ITŌ, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN 103 (1889).

⁹ See T. OSATAKE, KONAN JIKEN (1951).

¹⁰ MEIJI CONST. art. 61. See Ogawa, *Judicial Review of Administrative Actions in Japan*, in this symposium p. 1075 *infra*.

indeed formalistic and often illusory because of the way the basic public law-private law dichotomy, borrowed from the civil law world, worked in Japan. . . . There was, rather, a *de facto* dual status wherein officials remained largely above the justiciable law."¹¹

Also, neither the law courts nor the administrative courts could review legislation for constitutionality for, as Hirobumi Itō succinctly states, ". . . the duty of the [Meiji] judiciary is to pronounce judgment upon the infringements of right, according to the provisions of the law. In the judiciary, law is everything . . ."¹² "Law" in this context excluded any idea of a superceding constitutional law to be administered by the court; law which the Diet enacted and regulations and rules issued thereunder were conclusively valid. These Meiji principles of judicial power flowed analytically from the imported German dichotomy of public and private law. But the whole Meiji Constitution was also heavily overlaid with a Japanese theocratic concept of Imperial sovereignty and absolutism, best understood by reference to Japanese constitutional scholars of the era. Two of them wrote in English,¹³ and their results sound even more bizarre to an American lawyer than the same thing in the Japanese language—doubtless because of the impossibility of translating, with complete fidelity, such pure Japanisms.

Nevertheless, there developed a sort of judicial review after 1916 in the Great Court of Cassation (*Daishin'in* 1875-1947) worthy of notice in passing. The Great Court of Cassation began to review administrative orders challenged by criminal defendants on grounds of unconstitutionality, but no instance has been found where the court invalidated an order. In *Japan v. Sato*,¹⁴ the court did invalidate article 1 of an order issued under the Foreign Exchange Law because it was found to exceed the powers delegated by the statute. The case, though treated as a problem of statutory power, carried the implicit question of the constitutional balance between the jurisdiction of the Administrative Court and the Great Court of Cassation as the highest court of law. Presumably such a question, potentially constitutional, might have been debated, when properly raised by Imperial rescript, in the Privy

¹¹ D. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN* 416 (R. Ward ed., 1968).

¹² H. ITO, *COMMENTARIES ON THE JAPANESE CONSTITUTION* 101 (1889).

¹³ S. FUJII, *THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW* (1940); N. MATSUNAMI, *THE JAPANESE CONSTITUTION AND POLITICS* (1940).

¹⁴ 16 *Daishin'in keiji hanreishū* 193 (Gr. Ct. of Cass., March 3, 1937).

Council, but the Council virtually never functioned for such purposes.¹⁵

In summary, the Meiji courts were under the Ministry of Justice; the administrative and law courts were separate; and there was a complete lack of rule-making power or judicial review of legislation. All of these features have undergone drastic changes to achieve the rule of law envisaged by the new Constitution.¹⁶

II. THE NEW JUDICIAL POWER

As has already been suggested, interpretation of Article 81 presented complications derived perhaps from the broad experience of Japanese jurists with both the continental and the Anglo-American traditions. Soon after 1947, ingenious arguments were marshalled for the proposition that the new Supreme Court's powers of judicial review of "any law, order, regulation or official act" should be exercised by the Supreme Court sitting as a "constitutional Court" with a special "code of constitutional procedure" and rendering declaratory judgments on abstract questions of constitutionality.¹⁷ Ironically, some of these arguments were based on an exegesis of the text of Article 81 itself. One might surmise¹⁸ that the American lawyers who participated in its drafting thought Article 81 simply codified *Marbury v. Madi-*

¹⁵ M. HASEGAWA, *KEMPŌ HANREI NO KENKYŪ* 27 (1956), but see Satō, *Treaties and the Constitution*, in this symposium p. 1057, for comment on the constitutional role of the Privy Council on Treaty Discussions.

¹⁶ The Supreme Court's role in realizing the rule of law is mainly based on Articles 81 (see note 4 *supra*) and 98:

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

2. The treaties concluded by Japan and established laws of nations shall be faithfully observed.

¹⁷ Kakudo, *The Doctrine of Judicial Review in Japan*, 2 OSAKA L. REV. 59 (1953) for a summary of such views at their height of influence.

¹⁸ But note that in an earlier draft of Article 81 the ultimate power of judicial review for the Supreme Court was limited to civil rights cases:

As for litigations on the constitutionality of law and order, or administrative acts pertaining to the provisions of Chapter III [Rights and Duties of the People] of the Constitution, the trial of the Supreme Court is final.

The Diet may review the judgment of the Supreme Court in litigations on the constitutionality of law and order or administrative acts other than those above-mentioned in the preceding paragraph. In such cases the judgment of the Supreme Court shall not be reversed unless by the concurring vote of two-thirds of all the members of each House of the Diet.

The Procedure of review in the preceding paragraph shall be fixed by law. SUPREME COMMAND ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN 1945-1948 (Appendices) 628 (1948). This text is given in English as the First Government Draft of the Constitution, March 4, 1946; the present wording of Article 81 appeared as Article 77 in the Second Government Draft of the Constitution (Cabinet Draft) March 6, 1946 (see p. 634).

son¹⁹ and included the doctrine of *Muskrat v. U.S.*,²⁰ as well as *Massachusetts v. Mellon*.²¹ In 1953 such eminent scholars as Nobunari Ukai,²² Hajime Kaneko,²³ and Toshiyoshi Miyazawa²⁴ were already lined up in favor of the American approach, but Sōichi Sasaki²⁵ and others,²⁶ were arguing strongly for the continental type of review.

The Japanese idea of the constitutional court apparently comes from the *Verfassungsgerichtshof* instituted in Austria in 1920²⁷ and later in West Germany in 1947.²⁸ Rather than exercising its powers in a "case or controversy" context, a constitutional court reviews the statute itself ("in the abstract") and only at the behest of specified parties, usually public officers or entities. If the statute is found unconstitutional, it is abolished or loses its entire validity by some formal procedure calling for publication of notice or legislative consideration. Our closest equivalent in effect would be those cases where an enactment is said to be unconstitutional *ab initio* or "on its face."²⁹ For jurists with experience in both systems, the text of Article 81 does support arguments for either the continental or the "case or controversy" approach.

The textual argument for the constitutional court is based on Articles 81, 98 and 79. It is said that in contrast to the United States Constitution, where there is no literal provision made for judicial review, Article 81 explicitly gives the Supreme Court the power to determine the constitutionality of any law. So, if a lack of a provision in the United States Constitution may be interpreted to mean that, due to limits inherent in the nature of judicial power, law courts can only review statutes for constitutionality in the process of deciding cases, then the express grant to the Japanese Supreme Court must be construed as a grant to determine the constitutionality of a statute in general as a constitutional court; surely blanket authority expressly

¹⁹ 5 U.S. (1 Cranch) 137 (1803).

²⁰ 219 U.S. 346 (1911).

²¹ 262 U.S. 447 (1923).

²² Ukai, *Ikensei hanketsu no kōryoku*, 62 KOKKA GAKKAI ZASSHI 65 (1948).

²³ Kaneko, *Shihō seido*, 60 KOKKA GAKKAI ZASSHI 511 (1946).

²⁴ Miyazawa, *Saibansho no hōrei shinsaken*, 1 HORITSU TAIMUZU (No. 4) 7 (1947).

²⁵ Sasaki, *Saikō saibansho no Kempō saiban*, 11 KŌHŌ ZASSHI (No. 1) 1 (1950).

²⁶ Nakatani, *Hōrei-shinsaken to gōken-iken-shinsa Ketteiken*, 2 HŌGAKU RONSŌ (No. 1) 22 (1951). For a division of scholars on this and other points see Ashibe, *Iken rippō shinsaken no seikaku*, JURISUTO (No. 300) 48 (1964). See also J. TAGAMI, *KEMPŌ NO RONTEN* 304 (1965).

²⁷ AUSTRIAN CONST. art. 140 *et seq.* (1920).

²⁸ WEST GERMAN CONST. art. 93 *et seq.* (1947).

²⁹ *E.g.*, Norton v. Shelby County, 118 U.S. 425, (1886). See O. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 3 (1935) for the "void *ab initio*" theory.

granted must mean something more than no provision at all. This also distinguishes the Supreme Court from lower courts, which without such a grant as Article 81, can only review constitutionality in deciding disputes pending before them.³⁰

This new power is also the reason for Article 79 of the Constitution.³¹ The argument is that, since the Supreme Court has such important powers, the justices, unlike their American counterparts, may be dismissed by the people under Article 79 at the first general election for the House of Representatives and again after ten years.

The crossroads in this debate was reached in 1952 when Mosaburō Suzuki, then secretary general of the Social Democratic Party, raised these same arguments for a "constitutional court" based on the text of Article 81. The Supreme Court³² chose the American route, apparently irrevocably. In this landmark case, Suzuki petitioned the Supreme Court directly claiming exclusive jurisdiction for it to declare the newly established National Police Reserve unconstitutional as a violation of the no-war-potential clause of Article 9.³³ He argued that although the Supreme Court possessed the character of a judicial court, it could also exercise special powers, outside of the judicial power and

³⁰ Similarly Article 81 has been used to support opposition to the political question doctrine; that is, the specific grant of Article 81 means an exclusive power to review all questions, whereas without it the legislature or executive might be left to decide "political questions" as in the United States or under the Meiji Constitutional theory. See p. 1015 *infra*.

³¹ JAPANESE CONST. art. 79: The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

2. The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

3. In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

4. Matters pertaining to review shall be prescribed by law.

5. The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

6. All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

³² Suzuki v. Japan, 6 Saikō saibansho minji hanreishū [hereinafter cited Minshū] (Sup. Ct., April 15, 1953); 73 HÖGAKU KYÖKAI ZASSHI 62 (1956) (comment by Miyazawa); 29 MINSHÖHÖ ZASSHI 166 (1954) (comment by Kuroda).

³³ JAPANESE CONST. art. 9: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

not belonging to either the executive or legislative power—both as a court of original jurisdiction and as a court of last resort—to determine in the abstract without a concrete legal dispute before it, the constitutionality of laws, ordinances, and regulations, and official acts.³⁴

Specifically on the matter of foreign analogies the Court said:³⁵

When one examines the institutions of foreign countries in this regard, it is true that, in addition to countries where the judicial courts can exercise the right to determine questions of constitutionality, there are other countries where they cannot exercise this power, but where, instead, special organs are established for this purpose. The latter are empowered, irrespective of whether there exists a concrete legal dispute, to issue comprehensive and abstract declarations that laws, orders and the like are unconstitutional, and to set them aside and invalidate them.

However, what is conferred on our courts under the system now in force is the right to exercise the judicial power, and for this power to be invoked a concrete legal dispute is necessary. . . .

The plaintiff bases his case on Article 81 of the Constitution, but this merely provides that the Supreme Court is the court of last resort in cases involving the Constitution. . . . [With the powers of a special constitutional court] there would be danger of the Court's assuming the appearance of an organ superior to all other powers in the land, thereby running counter to the basic principle of democratic government: that the three powers are independent, equal, and immune from each other's interference.

The *Suzuki* case was later relied upon in *Tomabecki v. Japan*,³⁶ and thus the Japanese judicial power has since developed along lines rather close to American concepts. However, as we shall see later in the discussion of *Nakamura v. Japan*,³⁷ there is still room for clarification of the court's position on such concrete questions as: (1) what amounts to "case or controversy"; (2) who is the proper party to raise particular constitutional issues; and (3) the actual effect of a "declaration of unconstitutionality" on past or future similar cases under the same "unconstitutional statute."

In fact, one feature of the "constitutional court" idea has been adopted in current Japanese Supreme Court practice. When an official act is found to be unconstitutional, a copy of the judgment must be

³⁴ 6 Minshū 783 (Sup. Ct., G.B., Oct. 8, 1952), English translation in MAKI at 363-64.

³⁵ *Id.* at 784-85.

³⁶ 7 Minshū 305 (Sup. Ct., G.B., April 15, 1953).

³⁷ *Nakamura v. Japan*, 16 Saikō saibansho keiji hanreishū [hereinafter cited *Keishū*] 1593 (Sup. Ct., G.B., Nov. 28, 1962).

published in the Official Gazette and also sent to the Cabinet, and if the unconstitutional act is a statute, a copy of the judgment must also be sent to the Diet. This is more formal than the American practice and rather like the Austrian³⁸ or German³⁹ approach in that it seems to imply that the statute is invalid *ab initio*.

Before leaving the Japanese debate over a constitutional court, it should be noted that, in 1964, the Commission on the Constitution reported several opinions and proposals for amending the Constitution to permit a special constitutional court. Also, there was a variety of proposals for revising the judiciary (e.g., to provide special administrative, military or labor courts, or to revert to certain features of the old system).⁴⁰ But these views, though diverse and interesting, were advanced by a distinct minority. The general shape of the judicial power as forged by the court's own decisions is not likely to be changed by amendments in the future.

Besides laying the Japanese professorial idea of a special constitutional court to rest in 1952, the Japanese Supreme Court by dictum also noted a second point which concerns the power of lower courts to review legislation: "... the Supreme Court has power to examine the constitutionality of laws, orders and the like, but this power may be exercised only within the limits of the judicial power. *In this respect the Supreme Court is not different from the lower courts.* (See Constitution, Article 76(1).)"⁴¹ This point, though taken for granted in American practice, was a problem in Japan, doubtless stemming from the idea of a constitutional court, which, if it had been accepted, would mean that lower courts had no such power to review in the abstract and perhaps not even in a case. But even before the *Suzuki* case, the court, in *Yanagi v. Japan*,⁴² said that under Article 76(3)⁴³ the lower

³⁸ See AUSTRIAN CONST. art. 140 (1920).

³⁹ See WEST GERMAN CONST. (*Gesetz über das Verfassungsgericht*, art. 31(2) (1947)).

⁴⁰ Much detail on the revisions proposed before the Commission and the views and opinions of scholars and statesmen can be found in *Kempō chōsakai hōkokusho fozoku bunsho* No. 8 (Report of the Commission on the Constitution, Attached Document No. 8) KEMPŌ CHŌSAKAI, KOKUMIN NO KENRI OYOBI GIMU: SHIHŌ NI KANSURU HŌKOKUSHO 103 (1964).

⁴¹ *Suzuki v. Japan*, 6 Minshū 783 (Sup. Ct., G.B., Oct. 8, 1952), English translation in MAKI, at 364.

⁴² *Yanagi v. Japan*, 4 Keishū 72 (Sup. Ct., Feb. 1, 1950).

⁴³ JAPANESE CONST. art. 76: The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

2. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

3. All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

courts were also authorized, indeed required, in their handling of lawsuits to review for constitutionality. The special point of the *Yanagi* case can only be understood, however, if it is remembered that in the Japanese appellate system for cases initiated in the then Ward Courts (earlier counterpart of today's Summary Courts), the court below was the court of *jōkoku*⁴⁴ appeal, *i.e.*, the second and otherwise final appeal. This case started in the Hachiōji Ward Court in 1946 with a *kōso* appeal to the Tokyo District Courts, and a second appeal (*jōkoku*) to the Tokyo High Courts. Such cases, which occur in substantial numbers, would not normally reach the Supreme Court at all, but if the lower courts were held unable to review for constitutionality, the design of the appellate hierarchy which insulates the Supreme Court from these lesser cases would be frustrated by constitutional appeals to it, even where Supreme Court precedents already exist.

A third point, the political question doctrine,⁴⁵ was raised dramatically in *Japan v. Sakata*.⁴⁶ In a certain sense all constitutional questions had been "political questions" beyond the competence of the courts under the Meiji Constitution.⁴⁷ Article 81 of the new Constitution clearly granted the Supreme Court the final word on constitutional issues, but this still left the question whether it was constitutional, or discreet, for the Court to try to arbitrate certain major political issues involving powers of the other branches of the Government. In the *Sunakawa* case, where the lower court⁴⁸ had held the U.S./Japanese Security Treaty unconstitutional under Article 9, the court reversed by invoking the "political question" doctrine, saying the case must be regarded "as having a highly political nature which, . . . possesses an extremely important relation to the existence of our country as a sovereign nation."⁴⁹

⁴⁴ The *jōkoku* appeal is a second appeal on questions of law only as opposed to the *kōso* appeal, which is the first appeal from the trial court judgment. The court of *kōso* appeal has power to review both questions of law and fact when presented by the appellant. CIVIL PROCEDURE CODE arts. 378 *et seq.*, cf. art. 394. See MAKI, at xxv.

⁴⁵ See Yokota, *Political Questions and Judicial Review: A Comparison*, in this symposium p. 1031 *infra*. By Japanese scholars, the terms, "political question" (*seiji mondai*) of American origin and "act of government" (*tōchi kōi*) of French origin, are used as rough equivalents, but in content of course Japanese and American political questions, as developed by the cases, respectively are different. We are therefore using "political question" here to refer to the Japanese. See H. Itoh, *The Japanese Supreme Court: Judicial Decision Making Analysis* (unpublished thesis, Univ. of Wash., 1968).

⁴⁶ 13 Keishū 3225 (Sup. Ct., G.B., Dec. 16, 1959).

⁴⁷ See pp. 1006-09 *supra*.

⁴⁸ *Japan v. Sakata*, 13 Keishū 3305 (Tokyo Dist. Ct., Nov. 30, 1959) [hereinafter referred to as *Sunakawa*].

⁴⁹ 13 Keishū at 3234-35, English translation in MAKI, at 305.

But this use and recognition of the doctrine as a restraint on its own power becomes somewhat equivocal a few lines later in the opinion:⁵⁰

Consequently, the legal decision as to constitutionality has a character which, as a matter of principle, is not adaptable to review by a judicial court, which has as its mission a purely judicial function; accordingly, it falls outside the right of judicial review by the courts, *unless there is clearly obvious unconstitutionality or invalidity*.

Several other cases have advanced and refined the Japanese political question doctrine as explained in detail in an article by former Chief Justice Kisaburō Yokota, assisted by Hiroshi Itoh and Charles Routh.⁵¹

It is interesting to note in passing, however, that one Supreme Court Justice (Kotani)⁵² as well as several scholars⁵³ have opposed the recognition of any such "political questions" as falling outside the scope of judicial review. One argument against the doctrine is based on an interpretation of Article 81. The political question doctrine is rationalized as a limitation inherent in the nature of judicial power as understood in the Western countries of its origin. Therefore Article 81, being a special grant of power, removes this inherent limitation and confers upon the Japanese Supreme Court the power to decide all constitutional issues, regardless of their political character.

The court has answered a fourth question regarding its new powers: Does the judicial review envisaged by Article 81 extend to treaties? An important subsidiary question is the effect of Article 98 on the issue. This subject has been more fully treated by Professor Isao Sato.⁵⁴ Generally treaties are held to be reviewable, except where they overlap with the political question doctrine as was found in the *Sunakawa* case. There the Supreme Court, reversing the lower court, refused to review the U.S./Japanese Security Treaty under the Constitution (Article 9), holding that it involved a political question. There has also been a rather strong contrary view among some scholars to the effect that treaties as effective international law commitments are not reviewable based on their construction of Article 81, which does

⁵⁰ *Id.* at 3235.

⁵¹ In this symposium at p. 1031.

⁵² 13 Keishū at 3234, English translation in MAKI, at 341.

⁵³ T. ISOZAKI, TōCHI KŌI-SETSU HIFAN 72 (1965); Ukai, *Saibanken to kokka no jishusei*, 26 HŌRITSU JIHŌ (No. 8) 29 (1954).

⁵⁴ See his article in this symposium p. 1057.

not use the word "treaties," and Article 98(2),⁵⁵ which, they emphasize, sets out treaties separately from the "law," which is expressly subordinated to the Constitution in Article 98(1).

A fifth question arose as to whether lower court decisions could be declared unconstitutional as an "official act" (*shobun*) under Article 81. Again, this becomes a question in cases such as mentioned above where the High Courts (*kōtō saibansho*) are otherwise the final courts for *jōkoku* appeal. The question then is: Can the Supreme Court regard such a High Court judgment as an "official act" under Article 81 and thus review it for compliance with the Constitution? The answer was affirmative in *Komatsu v. Japan*.⁵⁶ A transitional statute, assigning a case from the old court system to the new one, was challenged, for giving the Supreme Court the power of constitutional review over *jōkoku* appeals of the High Courts, though they would have been otherwise unreviewable by the Supreme Court in the usual appellate hierarchy. The statute was upheld, but one might wonder whether the court should not have had the same power without it. Also, a lower court decision was held "unconstitutional" in *Nomura v. Yamaki*,⁵⁷ ironically, it was unconstitutional for following a prior Supreme Court precedent,⁵⁸ because the Supreme Court decided, for the first time in a civil case, to overrule the prior precedent. Rather than declare the statutes involved unconstitutional, it found the lower court's statutory interpretation erroneous amounting to a deprivation of constitutional right.

Thus out of the general language of Article 81 and other constitutional provisions, the Supreme Court has fashioned several doctrines useful in exercising its new powers of judicial review over official acts and statutes. In the next section we will scrutinize in detail the only two cases wherein the Court has actually declared statutes unconstitutional up to 1967.

III. THE JAPANESE CASE LAW ON JUDICIAL REVIEW OF LEGISLATION

We have seen that, despite Japanese scholarly advocates of a continental-style "constitutional court," the Japanese Supreme Court decided in *Suzuki v. Japan* to administer its new powers of judicial re-

⁵⁵ See Satō, *Treaties and the Constitution*, in this symposium p. 1057 *infra*.

⁵⁶ 2 Keishū 801, 806 (Sup. Ct., July 8, 1948).

⁵⁷ 14 Minshū 1657 (Sup. Ct., G.B., July 6, 1960). Justices Kawamura and Ikeda, concurring, asserted that the statute, Wartime Law art. 19, was unconstitutional, rather than unconstitutionally construed and applied as held by the majority. 14 Minshū 1657, 1669 and 1673 respectively. Justice Kotani, concurring, asserted that Monetary Law art. 7 was unconstitutional. 14 Minshū 1657, 1669.

⁵⁸ See D. HENDERSON, *CONCILIATION AND JAPANESE LAW* Ch. 9 (1967) for a detailed analysis of both cases.

view over legislation (1) only in the regular courts of law and (2) only as legislation might be challenged for unconstitutionality in "cases or controversies" brought to the court by (3) proper disputing parties. It is difficult to exaggerate the comparative law importance of this recent case law, for it not only directed Japanese judicial growth along lines familiar to American lawyers, but it also restricted the flow of constitutional challenges to the usual channels of litigation—a result which will tend to emphasize case law and presages some significant shifts in Japanese practice as to sources of law and juristic method generally. Indeed these trends are clearly discernible in the legal literature of the past decade producing a most interesting blend of case law and systematic analysis, indicating that Japanese lawyers are making the best of both worlds—common law and civil law.

*Sakagami v. Japan*⁵⁹ was the first case where a Diet enactment, applicable in the case, was held unconstitutional. In a sense it may be regarded as Japan's *Marbury v. Madison*,⁶⁰ but its value as precedent is diminished by the numerous opinions written by the justices, by the decision's consequent overall ambiguity, and by the fact that the unconstitutional statute involved merely extended the validity of Cabinet Orders in turn issued originally to implement SCAP directives which were by then inapplicable, except possibly to offenses, such as the one in this case, committed prior to the Peace Treaty (April 28, 1952). It was not until 1962 in a second case, *Nakamura v. Japan*,⁶¹ that the

⁵⁹ 7 Minshū 1562 (Sup. Ct., G.B., Oct. 8, 1953), English translation in *Cases and Materials for an Introductory Course on Japanese Law* ch. II (mimeo) (Henderson ed. 1967). Also in English, *Judgment Upon Case of Validity of Cabinet Order No. 325 of 1950* (General Affairs Bureau, General Secretariat, Supreme Court ed.); *Prominent Judgments of the Supreme Court upon Questions of Constitutionality* (No. 1, 1954). Comments: 15 KEIJI HANREI HYŌSHAKUSHŪ 223 (1960) (comment Ono); HANREI TAIMUZU (No. 30) 16 (1953) (comment Taniguchi); JURISUTO (No. 41) 2 (1953) (comment Mano); 25 HŌRITSU JIHŌ 888 (1953) (comment Ono).

⁶⁰ 5 U.S. (1 Cranch) 137 (1803).

⁶¹ *Nakamura v. Japan*, 16 Minshū 1593 (Sup. Ct., G.B., Nov. 28, 1962), English translation in *Cases and Materials for an Introductory Course on Japanese Law* ch. II (mimeo) (Henderson ed., 1967), modifying and overruling in part points in *Omachi v. Japan*, 14 Keishū 1574 (Sup. Ct., G.B., Oct. 19, 1960). Comments on the Nakamura case: *Kempō hanrei hyakusen* 76 (comment Hirano), JURISUTO (*special issue*) (June 1963); JURISUTO (No. 266) 48 (1963), also JURISUTO (No. 338) 45-49 (1966) (notes Taniguchi); JURISUTO (No. 228) 10 (1963) (note Kiyomiya); 80 HŌGAKU KYŌKAI ZASSHI (comment George); 32 KEISATSU KENKYŪ 1, 2 (comment Usui); cf. companion cases, *Kunihiro v. Japan*, 16 Keishū 1577 (Sup. Ct., Nov. 28, 1962) and *Mihara v. Japan*, 16 Keishū 1672 (Sup. Ct., Dec. 12, 1962), which invalidated confiscations under old laws which were not effective prospectively at the time of decision, though they would have been applicable to the defendant, had they not been unconstitutional. In this sense they are comparable to the *Sakagami case*, note 59 *supra*; *Kinjo v. Japan*, 11 Keishū 3133 (Sup. Ct., Nov. 27, 1957), *Omachi v. Japan*, 14 Keishū 1574 (Sup. Ct., G.B., Oct. 10, 1960), *Shimuzu v. Japan*, 14 Keishū 1611 (Sup. Ct., Oct. 19, 1960), JURISUTO (No. 215) 68 (1960) (note Judge Tatsuoka),

Japanese Supreme Court first declared unconstitutional a statute which was still *prospectively* applicable at the time of the decision. Of course, previously the Court had upheld statutes against challenges of unconstitutionality, and lower courts had held several statutes and orders unconstitutional, only to be reversed.⁶² Also several concurring or dissenting justices had written 'opinions in Supreme Court cases, asserting that certain statutes were unconstitutional.⁶³ However, since the *Sakagami* and *Nakamura* cases have set new benchmarks in over a century of rising judicial power in Japan, they are worth setting out in some detail so that the concrete approach and subtlety of reasoning of the Japanese justices can be appreciated.

In *Sakagami v. Japan*,⁶⁴ the issue was the constitutionality of statutes passed at the time of the Japanese Peace Treaty. The statutes were intended to extend the effect of a complex series of Imperial Ordinances, Cabinet Orders and SCAP Directives⁶⁵ under which the defendant, Sakagami, had been convicted in the District Court (affirmed in the Sendai High Court) for illegal publication of a commu-

Kitaoka v. Japan, 15 Keishū 1854 (Sup. Ct., Dec. 14, 1961), JURISUTO (No. 248) 20 (1962) (comment Taniguchi).

⁶² E.g., Yamato v. Japan, 4 Keishū 2037 (Sup. Ct., G.B., Oct. 11, 1950), quashing and returning a Fukuoka District Court holding to the effect that Criminal Code art. 205(2) was unconstitutional for prescribing a heavier penalty for injury causing death of a lineal ascendant or spouse than for injuries causing death to others.

⁶³ E.g., in Nomura v. Yamaki, 14 Minshū 1657 (Sup. Ct., G.B., July, 1960) at 1669 (J. Kawamura) and at 1673 (J. Ikeda) and at 1669 (J. Kotani); Yoneuchiya v. Japan, 7 Minshū 43 (Sup. Ct., April 28, 1952) (J. Mano).

⁶⁴ 7 Minshū 1562 (Sup. Ct., G.B., Oct. 8, 1953).

⁶⁵ The legislative scheme involved in the transition from the allied occupation to complete Japanese government autonomy was underlying the specific statutes challenged in this case. The Potsdam Declaration (See SUPREME COMMAND ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN 1945-1948 (Appendices) 413 (1948)) was accepted by Japan as a basis for the Japanese Instrument of Surrender signed Sept. 2, 1945 (see *id.* 419) and the Supreme Commander of Allied Powers was to direct the Japanese government to achieve the goals of surrender. To comply with these Japanese obligations to SCAP, Imperial Ordinance 542, Sept. 20, 1945, entitled *Potsdam sengen no judaku ni tomonai hassuru meirei ni kansuru ken* (Concerning orders to be issued accompanying acceptance of the Potsdam Declaration) authorized the Japanese government to issue regulations and penal orders as necessary to effectuate SCAP demands implementing the surrender and the Potsdam Declaration. Cabinet Order 325 (Nov. 1, 1950) under consideration here (entitled *Senryō mokuteki sogai kōi shobatsu-rei* (Order for the punishment of acts prejudicial to occupation objectives) was one of the cabinet orders passed under Imperial Order 542, and it provided penalties for any "act prejudicial to occupation objectives," which meant for purposes of this case, acts violating any SCAP directive to the Japanese government. In other words, the content of punishable crimes under Cabinet Order 325 could only be determined by reference to the effective SCAP directives at the time. The SCAP directives violated by defendant in this case were SCAP bans placed on the communist paper, *Akahata* (Red Flag) or its successors:

1) *Akahata no 30 nichikan hakkō teishi ni kansuru MacArthur gensui no nai-kaku sōridaijin ateno shokan* (Message from General MacArthur to the Prime Minister, dated June 26, 1950, concerning the suspension of publication of *Akahata* for 30 days);

nist newspaper. The Supreme Court in a ten to four decision reversed and acquitted Sakagami. With seven different opinions filed, and with a variety of theoretical,⁶⁶ constitutional and legal issues raised, and viewed differently, by the several opinions, the case is difficult to appraise. Nevertheless, the Japanese Supreme Court did hold for the first time that statutes of the Japanese Diet were unconstitutional, resulting in the reversal of the conviction. And since the statute had effect, if at all, only for past offenses and therefore the case involved little chance for friction between the Diet and the Court, it was an opportune occasion for the initial exercise of the Court's new power with a minimum of political risk.

Sakagami was convicted for publishing a paper called *Heiwa no koe*, in violation of a SCAP directive banning publication of the *Akahata* (Red Flag), a communist newspaper, or its successor. The whole legal

2) *Akahata oyobi sono kōkeishi narabini dōruishi no mukigen hakkō teishi ni kansuru MacArthur gensui no naikaku sōridaijin ate shokan* (Message from General MacArthur to the Prime Minister, dated July 18, 1950, concerning the indefinite suspension of publication of *Akahata*, successors of *Akahata*, and the like).

The violation occurred January 2-25, 1951, and the judgment at first instance (Morioka Dist. Ct., June 25, 1951) was rendered April 28, 1952. After the Sendai High Court affirmed the District Court on appeal, the Supreme Court decided the *jōhoku* appeal, on July 22, 1953. In the interim the Japanese Peace Treaty became effective April 28, 1952. The occupation ended and SCAP was dissolved on the same date, along with all of its directives and other legal authority. Dovetailed with the peace treaty was a Law No. 81, April 28, 1952, entitled *Potsdam sengen no judaku ni tomonai hassuru meirei ni kansuru ken no haishi ni kansuru hōritsu* (The law concerning the abrogation of "Concerning orders to be issued accompanying acceptance of the Potsdam declaration"), which repealed Imperial Ordinance 542, but provided that orders issued under it would remain effective for 180 days from April 28, 1952, unless some other laws provided otherwise. Such a law was enacted May 7, 1952 (Law No. 137) entitled *Potsdam sengen no judaku ni tomonai hassuru meirei ni kansuru ken ni motozuku hōmushō kankei shohōrei no sochi ni kansuru hōritsu* (The law concerning the disposition of related statutes in the Department of Justice: In connection with the "Concerning orders to be issued accompany the acceptance of the Potsdam declaration") [hereinafter Law 137]; it repealed Cabinet Order 325 and provided "the application of penal provision to acts committed before enforcement of this Law shall continue in the same manner as formerly." The questions then were whether Laws 81 and 137 prolonged the validity of penalties under Cabinet Order 325 or the validity (as against the effects of Criminal Code art. 6 or Criminal Procedure Code article 337) of subsidiary SCAP directives banning the defendant's publication at least so far as the directive and order applied to acts committed before the Peace Treaty became effective April 28, 1952.

⁶⁶ The chief theoretical question involved the prewar German concept of *zeitgesetz* meaning a law with a fixed period of validity. One of the special characteristics of *zeitgesetz* was that their penal provisions are applied, even after their validity for future offenses ends, to offenses committed while they were effective. Thus, if Order No. 325 were classified here as a *zeitgesetz*, then Criminal Code art. 6 and Criminal Procedure Code art. 337(ii) are inapplicable and will not prevent enforcement of the penalties against Sakagami for his offense prior to abolishing Order 325. In other words, as a matter of legal theory the penalties may persist for prior offenses even after the law ends (or even becomes unconstitutional for future cases) unless there is a specific legal waiver. See concurring opinion of Justice Mano opposing this view at 7 Keishū 1562, 1586 (Sup. Ct., G.B., July 22, 1953).

structure, fashioned to implement the occupation, was finally held by the Japanese Supreme Court in *Hasegawa v. Japan*⁶⁷ to provide for the operation of SCAP (and the Japanese government when supporting SCAP) during the allied occupation quite outside of the Japanese Constitution (*kempō-gai*), of either 1889 or 1947.

This latter point was significant to Sakagami because he argued that once the peace treaty was signed April 28, 1952, the Constitution alone governed, and regulations "outside the Constitution" were thenceforth forbidden; the authority of SCAP and all SCAP-based law were therefore simultaneously dissolved; all governmental action was immediately subject only to constitutional standards. But the Japanese government, apparently feeling that some or all current SCAP regulations might be useful temporarily even after the Treaty, enacted the two interim laws (No. 81 and No. 137) challenged in this case. Law No. 81 repealed Imperial Ordinance No. 542 but extended the Cabinet Orders issued under it (including No. 325 involved here) for 180 days. But then a few days later the Diet passed Law No. 137 repealing Cabinet Order 325, but provided: "The application of penal provisions to acts done before enforcement of the law shall be in the same manner as formerly."

Besides the foregoing statutory pattern, there was an important timing sequence as shown by the following events:

Imperial Ordinance No. 542	Sept. 20, 1945
Cabinet Order No. 325	Nov. 1, 1950
SCAP Directives banning communist papers	June 26 and July 18, 1950
Sakagami published <i>Heiwa no koe</i>	January 2-25, 1951
Trial below completed	April 28, 1952
Peace Treaty effective	April 28, 1952
Law No. 81 Retaining Order 325 in support of SCAP directives	April 28, 1952
Law No. 137 repealing Order 325 but applying its penalties to acts pre-dating treaty	May 7, 1952
Supreme Court Decision	July 22, 1953

Since Sakagami's violation pre-dated the Treaty, the question was whether Law No. 81 and Law No. 137 were constitutional in attempting to extend Cabinet Order 325 and penalties under it to offenses committed before the Treaty, but tried or appealed after the Treaty. If these statutes were constitutional and applicable, the conviction

⁶⁷ 7 Keishū 775, 787-788 (Sup. Ct., G.B., April 8, 1953).

should have been upheld, but since the majority found them unconstitutional, the court reversed the conviction.

But the "majority" was composed of two groups which disagreed on the basis for holding the statutes unconstitutional. Six of the justices (Mano, Kotani, Shima, Fujita, Tanimura and Irie) decided to reverse the conviction as based on statutes unconstitutional *per se*, because of positive-law formalities of timing (*i.e.*, when the treaty began the occupation and its law ended because they did not comply with the Constitution and could no longer operate "outside the Constitution"), nor could the new laws save them. They held that Law No. 81 was unconstitutional because it extended Cabinet Order No. 325 penalizing violations of SCAP directives, but it did not extend the effect of said directives so that the cabinet order, standing alone, was open-ended and meaningless. Their reasons why by interpretation the directives should not have been deemed incorporated by reference or still effective until nullified as others argued is not clear in their opinion. Similarly formalistic was the argument of these six justices regarding the unconstitutionality of Law No. 137. They said that, since Order No. 325 lost its effect with the enforcement of the Peace Treaty, Law No. 137 would be an *ex post facto* law in attempting to apply penalties from the date of its enactment on May 7, 1952, backwards to acts committed before (presumably because of the nine-day gap, April 28 to May 7, 1952), thus violating the Japanese Constitution Article 39.⁶⁸ These six justices found it unnecessary to consider substantively whether the SCAP directives placing a ban on communist papers was constitutional by post-treaty standards (*i.e.*, after these directives were no longer permitted to operate "outside of the Constitution").

The four justices of the second group in the majority (Inoue, Kuriyama, Kawamura, and Kobayashi) held that Cabinet Order No. 325 need not automatically dissolve after the treaty, because some of its effect (through SCAP directives then in fixed and final form) might be as useful to the Japanese public welfare as to SCAP. Thus these justices found the directives still effective to the extent they were then consistent with the Japanese Constitution, though this opinion is not clear either as to whether their theory was one of incorporation of the directives by reference to Cabinet Order No. 325 or Law No. 81, or

⁶⁸ JAPANESE CONST. art. 39: No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

whether they remain effective automatically until repealed. But since they were considered effective, if constitutional, the next question was whether the law was consistent with the Japanese Constitution Article 21 protecting freedom of expression. The four justices then held that the ban was an unconstitutional blanket prohibition worse than censorship. So the directive and Cabinet Order 325 were both unconstitutional; and Law No. 81, seeking to extend Order 325, as well as Law No. 137, article 3, repealing No. 235 but seeking to retain its penalties for punishment of prior acts, were also both unconstitutional on substantive grounds. Accordingly they reversed on the statutory grounds that Code of Criminal Procedure Article 337 requires acquittal when the penalty has been abolished after the decision below, as was the result here.

We do not know how many of the six justices who decided on formalistic or per se grounds might have sided with the dissenters on the substantive grounds (*i.e.*, whether the ban on communist papers violated Article 21 of the Constitution). Indeed one dissenter, Justice Saitō, in a separate opinion,⁶⁹ argued that since the two groups in the majority, though agreeing on reversal for unconstitutionality, did not agree on the basis of their respective decisions, and that the lower court decision should therefore have been upheld for lack of a majority to reverse. Justice Saitō's argument raised a question which has been discussed some by scholars as to whether a vote of the justices should be first taken as to the desired result in the whole case, or whether the justices should vote on each preliminary point in logical order and be bound at each stage by that majority vote in deciding on the next point. Clearly the result would sometimes differ depending on which voting procedure was followed.⁷⁰ Apparently the Japanese court votes German-style, by stages, as did the prior Great Court of Cassation; unlike the Great Court of Cassation each justice expresses his differences with the majority opinion in a concurring or dissenting opinion.⁷¹

The dissenters (Chief Justice Tanaka and Justices Shimoyama, Saitō and Motomura) based their opinion on a timing analysis, mainly on the point that the law providing for penalties for offenses occurring before the treaty was validly applied to such offenses, even by a court

⁶⁹ 7 Keishū 1585 (Sup. Ct., G.B., July 22, 1953). See also Tanaka, *Mitsui-ijō no iken no tairitsu: saikōsai no hyōketsu no hōhō*, 29 HÖRITSU JIHŌ 728 (1957).

⁷⁰ Ueki v. Japan, 109 Saibanshū keiji 341 (Sup. Ct., G.B., Oct. 12, 1955).

⁷¹ H. Itoh, Japanese Supreme Court: Judicial Decision Making Analysis, 85 and 112-114 (unpublished thesis, Univ. of Wash., 1968).

sitting later, unless the penalties were intentionally abolished by law. Contrariwise, they argued, the penalties were specifically not abolished by Law No. 137. So, although Law No. 81 might be unconstitutional to extend the penalty to post-treaty cases, it was not unconstitutional to apply the law, even after it might become unconstitutional for prospective effect, to offenses committed while it was effective and thus constitutional.

Also, the dissenters stated that the lower court finding that the defendant's publication was subversive and, therefore, not protected expression could not be questioned in a *jōkoku* appeal.

In the second case, *Nakamura v. Japan*,⁷² the Japanese Supreme Court for the first time declared a statute unconstitutional which was *prospectively* effective at the time of the decision. The defendants, Nakamura and others, had attempted to smuggle 18 bales of textiles owned by a third party from Osaka to Korea, but they were driven back to Fukuoka, Japan, by bad weather and apprehended, tried and convicted in the Fukuoka District Court.⁷³ They were sentenced to imprisonment with suspended sentences, and under Customs Law Article 118(1), the third party's goods were confiscated, along with defendant's boat. The Fukuoka High Court⁷⁴ affirmed, and defendant filed a *jōkoku* appeal with the Japanese Supreme Court, arguing in part that confiscation of goods of a third party, who had not been given notice or a hearing, was unconstitutional under Articles 29 and 31 of the Constitution. The Supreme Court affirmed the imprisonment convictions, but reversed the decision ordering confiscation of the third party's property, seeming to hold, though the precise *ratio decidendi* is difficult to ascertain,⁷⁵ that in the absence of statutory procedures to give such a third party due notice and a chance to be heard, article 118(1) violated Constitution Articles 31 and 29, even though article 118(1) might be constitutional as a substantive provision.

This case is not only important as the first decision where the court declared a presently effective act of the Diet unconstitutional, but also,

⁷² 16 Keishū 1593 (Sup. Ct., G.B., Nov. 28, 1962).

⁷³ *Id.* at 1629.

⁷⁴ *Id.* at 1630.

⁷⁵ See JURISUTO (No. 268) 10, 12 (1963), where Professor Kiyomiya suggests that the court is saying in Nakamura that *both* the statutes (art. 118(1)) and the disposition (*shobun*), confiscating third-party property, are unconstitutional; Professor J. Tanaka then suggests it is not the (substantive) statute, but the statute's *lack* of a procedure complying with constitutional standards of notice and a hearing which is unconstitutional, and Professor R. Hirano seems to agree; Professor Ashibe disagrees, opining that it is article 118(1) itself that is held unconstitutional in the majority opinion.

in its eight separate opinions, it gives us an opportunity to observe the nuances of reasoning by the several Japanese justices, grappling with the very nature of judicial power. The difficulties they were experiencing were attested by the fact that the Court modified or overruled a position it had taken two years earlier to the effect that such a confiscation could not be attacked on appeal by a defendant on the basis of a third party's constitutional rights.⁷⁶

Looking at the major opinions in the order in which they appear in the Reporter we find that the majority declares Customs Law Article 118(1) unconstitutional because it feels that the confiscation judgment had the effect in fact of transferring the property from the third party to the state, and such a transfer of property could not take place without "due process" (Constitution Article 31), requiring notice and a hearing for the non-party owner. No such hearing was provided for the third party owner in the procedural law; therefore, article 118(1), lacking such complementary procedure and authorizing confiscation without it, is unconstitutional. On the issue of defendant's standing to raise a third party's constitutional rights, the Court also says that to take the property from the possession of the defendant was an additional penalty against him (*i.e.*, lost possession plus risking a claim by the owner); hence defendant had sufficient interest to invoke the violation of the third party's constitutional rights.

Justice Irie filed a concurring opinion⁷⁷ which reasserts his dissenting position in the *Omachi* case with due consistency, but he stresses that, since *Omachi*, he has changed his mind on one point: now he believes that simply calling the third party as a witness,⁷⁸ as he suggested in *Omachi*, would be insufficient; the third party owner must be summoned as a party. Justice Irie also stresses the point that Article 31 guarantees both substantive and procedural rights (like the Meiji Constitution Article 23).

Justice Tarumi⁷⁹ concurs but emphasizes a substantive-procedural dichotomy. He insists that in order to comply with constitutional standards, laws providing for confiscation of third party property

⁷⁶ *Omachi v. Japan*, 14 Keishū 1574 (Sup. Ct., Oct. 19, 1960).

⁷⁷ 16 Keishū 1593, 1598.

⁷⁸ *Yoshida v. Japan*, 19 Keishū 203 (Sup. Ct., G.B., Apr. 28, 1965), HANREI JIHŌ (No. 407) 19 (1965), reversing a collection of money from a third party in lieu of confiscation from him (*tsuichō*), even though the third party had appeared as a witness, but not as a party.

⁷⁹ 16 Keishū 1593, 1601.

must not only require fault on the part of the third party as a matter of substantive law, but must provide proper procedures such as notice and a fair hearing. In other words, a forfeiture law, even though substantively constitutional, cannot be constitutionally applied without procedures for notice and a hearing.

Also, Justice Okuno asserts that article 497 of the Criminal Procedure Code conferring a right to recover property, does not apply to the third party owner here because to come under article 497 the taking must have occurred under the mistaken understanding that the property belonged to the defendant.

The dissents, focusing on the basic nature of judicial power, raise several questions. Does the defendant have standing to assert constitutional rights of a third party, even though the law, thus attacked, is constitutional as applied to defendant? Justices Fujita⁸⁰ and Shimoizaka⁸¹ say no, though the latter allows for exceptions where the third party is unable to assert the right himself. Is there a "case or controversy" regarding the third party's right, when the defendant, as the only party before the court, either suffers no legal loss, or loses possession, if at all, only after *defendant* has been fully notified and heard? Justice Shimoizaka⁸² sees no case or controversy here. Would a judgment in a proceeding against the defendant purporting to deprive a third party owner of his property without notice or a hearing be res judicata in an action by the third party to regain the property, *i.e.*, can the judgment actually reach the third party? Justice Yamada⁸³ answers in the negative, asserting that no principle is more fundamental to procedural law than the proposition that a judgment binds only parties before the court by virtue of minimal contacts, notice or the like. By inference Shimoizaka seems to support this position because, disagreeing with Okuno, he believes that the third party can recover the property from the State under article 497.

Both Okuno and Shimoizaka refer to cases of the U.S. Supreme Court, but they do not cite what cases they are quoting or relying on.⁸⁴

In summary the majority in *Nakamura v. Japan* seems to declare article 118(1) of the Customs Law unconstitutional, because it is

⁸⁰ *Id.* at 1593, 1608.

⁸¹ *Id.* at 1593, 1612.

⁸² *Id.* at 1593, 1609.

⁸³ *Id.* at 1593, 1616; see also Justice Yamada's consistent and persuasive concurring opinion in *Yoshida v. Japan*, 19 Keishū 203 (Sup. Ct., G.B., April 28, 1965) and dissenting in *Matsuyama v. Japan*, 19 Keishū 300 (Sup. Ct., G. B., April 28, 1965).

⁸⁴ Compare *People v. Broad*, 216 Cal. 1, 12 P.2d 941 (1932) (confiscation of a third party's automobile found unconstitutional).

construed to support the lower court's judgment confiscating the third party's property without a hearing. Such a deprivation of third party property without "due process" violates Articles 21 and 31 of the Constitution and can be attacked by the defendant.

On the other hand, the dissenters assert that the majority gratuitously made a constitutional issue of the case; the matter should have been handled as a simple procedural matter based on proper conceptions of the inherent limits of judicial power. Since a court can neither decide a hypothetical case; nor hear a party assert another's rights for his own benefit; nor render a judgment binding on a party not before it, this confiscation judgment only affects the defendant, depriving him only of what he has, possession—and quite properly so, because he has been notified and heard. This limited effect is legally correct even though the procurators and bailiffs may have intramural practices lingering from prewar days for enforcing such judgments illegally against third party owners. Such excesses can be corrected when the third party brings an action to recover his property, if indeed he dares to appear and assert that he was unaware of the use of his property in the crime.

After reflecting on the various opinions, one can conclude that this first Japanese exercise in judicial review invalidating an effective statute was quite unnecessary. The analyses of the dissenters Fujita, Shimoizaka and particularly Yamada, are quite persuasive in fixing the constitutional scope of judicial power. By confining the court's powers within the concepts of (1) "case or controversy," or (2) proper parties to raise the question of constitutional rights or (3) the binding scope of the judgment, the dissenters proposed to avoid a constitutional issue in this case by simply depriving the defendant of possession, as was clearly within their constitutional power, or by denying him standing to litigate the rights of a third party on an abstract point. The third party owner could always assert his right to the property, and if he did not do so, the law need not be concerned with his lack of concern for his property. This proposed result, besides standing up analytically, achieves specific justice in the case, since the defendant would have incurred, without deprivation of due process, the additional penalty duly imposed by the substantive law, and the third party would have title and possession at such time as he appeared to take responsibility for it. Surely these results against both defendant and the third party are preferable to leaving the

property in the hands of the convict, as seems to have been done by the Court here.

As noted, the Supreme Court rules⁸⁵ require the Supreme Court to notify the Cabinet when a statute is held to be unconstitutional, and our search indicates that this is the first instance where such a report was made to the Cabinet and Diet. In the *Sakagami* and *Kunihiro* cases, the statutes were already ineffective for future cases; so no formal report was made.

Soon after this decision the Diet passed a statute⁸⁶ providing for procedures to notify and hear third party owners in confiscation cases.⁸⁷ However, the statute was narrowly drawn, and it does not provide procedures to cover a case where a money fine equivalent in value to the property is taxed against a third party owner in cases where the property cannot be confiscated. For example, in *Yoshida v. Japan*⁸⁸ the Supreme Court reversed a judgment assessing the value of a bribe against a third-party recipient because the lower court failure to give the third-party recipient a hearing rendered the judgment under article 197-4 of the Criminal Code unconstitutional.⁸⁹ The lower court judgment, ordering the third party to pay even though he had received no notice or hearing, apparently was regarded as a violation of Article 29 and Article 31 of the Constitution. It is not clear in the opinion whether, like Customs Law Article 118(1) in *Nakamura* article 197-4 of the Criminal Code was unconstitutional for lack of procedures, but it is clear that the interim legislation passed to fill the procedural gap exposed in the *Nakamura* case did not solve the procedural problems in these cases of third party assess-

⁸⁵ *Saikō saibansho jinmu shori kisoku* (Regulations for Disposition of Supreme Court Affairs) (Sup. Ct. Reg. No. 6, Nov. 11, 1947), art. 12: "Eight or more judges must agree when a judgment declaring laws, orders, regulations or official acts unconstitutional is rendered." Art. 14: "When a judgment under Art. 12 is rendered, its holding shall be publicly announced in the Official Gazette and the original of the written judgment shall be sent to the Cabinet." If the judgment has held a statute unconstitutional, the original of the written judgment must be sent to the Diet also.

⁸⁶ *Keiji jiken ni okeru daisansha shoyūbutsu no bosshū tetsuzuki ni kansuru ōkyū sochihō* (Temporary law concerning confiscation procedure in criminal cases for goods owned by a third person). (Law No. 138, July 12, 1963), 10 GENKO HOKI (SHIHŌ) (No. 2) 1748.

⁸⁷ See *Tsai Pei-nan v. Japan*, HANREI JIHŌ (No. 445) 15-18 (1966), where the Supreme Court upheld the Osaka High Court's decision holding a confiscation invalid for failing to follow the duly enacted procedures of Law No. 138 (July 12, 1963) article 3(1). The defendant and the third party's interest could not be confiscated with a hearing.

⁸⁸ 19 Keishū 203 (Sup. Ct., G.B., April 28, 1965).

⁸⁹ CRIMINAL CODE art. 197-4: A bribe received by an offender or by a third person having knowledge of its nature shall be confiscated. If the confiscation of the whole or a portion of the bribe is impossible, the value thereof shall be collected.

ment (*tsuichō*) in lieu of confiscation, even though the article of the Customs Law involved in *Nakamura* used the *tsuichō* device.⁹⁰

A second *tsuichō* case⁹¹ decided on the same day as *Yoshida* is puzzling because the Supreme Court upheld the conviction even though the third party had not been made a party. The result, otherwise inconsistent with *Yoshida*, seemed to rest on the fact that the defendant was the representative of the third party (the Uzumasa branch of the Kyoto agricultural cooperative) which received a bribe, and apparently the defendant was regarded as speaking for the cooperative also. Still the result is difficult to accept and Justice Yamada's and Justice Matsuda's dissents are most persuasive.

Both of the complex cases reviewed above and their aftermath provide more stimulus for further analyses than clear answers for the future shape of Japanese judicial review. These cases, along with others discussed in Part II herein, however, have established a background on which the courts can further clarify the ideas introduced in the several opinions. Once a court opts against constitutional review in the abstract, it grows with experience in defining (1) how it will exercise judiciary power, (2) against whom, and (3) to what effect.

IV. CONCLUSION

The 1947 Constitution greatly enhanced Japanese judicial powers: (1) the courts were separated from the executive branch and no longer subjected to the administrative supervision of the Ministry of Justice; (2) the Meiji administrative court was abolished and the law courts with the Supreme Court at the apex were empowered to decide all cases in both public and private law; (3) the Supreme Court was given rule making power to determine its own procedural and operating rules; (4) the Supreme Court was also made the court of last resort to determine questions of constitutionality of statutes and other official acts; (5) and no special courts were to be established.

The implementation of this new power has posed a number of

⁹⁰ CUSTOMS LAW art. 118(2): When the criminal cargo that should be confiscated under the provision of the preceding paragraph cannot be confiscated or when the criminal cargo is not confiscated according to the provisions of item 2 of that paragraph, an amount equivalent to the value (*kakaku*) at the time when the crime was committed of such criminal cargo that cannot be confiscated or is not confiscated shall be collected as an additional penalty (*tsuichō*) from the criminal.

⁹¹ *Matsuyama v. Japan*, 19 Keishū 300 (Sup. Ct., G.B., April 28, 1965); 17 Hōsō JIHō 1452 (1965) (comment Nishikawa).

intricate problems, and for their solution the legacy from the prewar era has provided support in at least two important respects: (1) the traditional sociality of the Japanese people—the capacity for rational pursuit of collective values has served them well in achieving a new value: the maximum respect for the individual; (2) the sophisticated legal theory, nurtured and expanded from civil-law borrowings before the war, is now flowering into a refined but practical legal science using more case law and based on a cooperative effort of the entire legal profession.

The Supreme Court has answered, case by case, a number of important subsidiary questions in the past two decades: (1) judicial review will be exercised only in “cases or controversies”; (2) the lower courts share this power to review for constitutionality in the course of deciding cases before them; (3) political questions are not reviewable; (4) treaties are subject to judicial review; (5) and lower court decisions may be declared unconstitutional.

The major debate has centered around the role of the Supreme Court in exercising its new powers of judicial review over statutes. In the early years, some writers supported the idea of a special “constitutional court” which could review a statute in the abstract. However, by 1952, the Supreme Court had decided in favor of a “case or controversy” context for judicial review, and this approach, similar to the American method, has prevailed since. Nonetheless, the practice of reporting unconstitutional statutes to the Diet and a tendency to regard statutes found unconstitutional in one case to be per se unconstitutional, as well as original doubts as to whether lower courts had powers of judicial review and also arguments that even “political questions” were reviewable, seem to be vestiges of the continental notion, strengthened by certain constructions of Article 81 of the Constitution, that statutes can be reviewed in the abstract.

In addition, close readings of *Sakagami v. Japan* and *Nakamura v. Japan*, the first cases declaring statutes unconstitutional, reveal that several problems remain to be settled on a case by case basis. For example, dissenting opinions of Justices Shimoizuka and Yamada in *Nakamura* seem quite persuasive to a “case or controversy” lawyer. For in *Nakamura* the Court apparently overlooked the usual strictures regarded as inherent in judicial power and declared an act unconstitutional for the commendable purpose of protecting a third party against failures of due process. But the third party needed protection only

because the Court presumed to bind him when he was not "before the court," and, furthermore, the Court's dilemma was posed by a defendant not qualified by usual concepts to raise the issue. As Justice Shimoizaka indicated in his dissent, neither the issue nor the party were actually within the reach of the Court. Like its United States counterpart,⁹² the Japanese Supreme Court must continue to seek a proper scope for its powers, and proper modes for their exercise, in order to meet the needs of a changing society.

⁹² See, e.g., (1) *Barrows v. Jackson*, 346 U.S. 249 (1953); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); (2) *Linkletter v. Walker*, 381 U.S. 618 (1965); *Miranda v. State of Arizona*, 384 U.S. 436 (1966), for recent United States Supreme Court questings.